



Lipsitz Green Scime Cambria LLP

Attorneys at Law

42 Delaware Avenue, Suite 120, Buffalo, New York 14202-3924 P 716 849 1333 F 716 855 1580 (Not for Service) www.lglaw.com

Paul J. Cambria, Jr.^{1,3,5}
 James T. Scime
 Herbert L. Greenman
 Michael Schiavone
 Laraine Kelley
 William M. Feigenbaum
 Joseph J. Gumkowski
 Richard P. Weisbeck, Jr.
 Mark L. Stulmaker
 Barry Nelson Covert
 Robert L. Boreanaz
 Thomas M. Mercure
 John A. Collins
 George E. Riedel, Jr.²
 Michael P. Stuermer³
 Jeffrey F. Reina
 Cherie L. Peterson
 Joseph J. Manna
 William P. Moore
 Sharon M. Heim
 Paul J. Cieslik
 Gregory P. Krull
 Jonathan W. Brown³
 Philip Scaffidi
 Robert E. Ziske
 Thomas C. Burnham
 Patrick J. Mackey⁴
 Matthew B. Morey
 Elizabeth A. Holmes
 Max Humann^{1,6}
 Katherine A. Gillette
 Lynn M. Bochenek
 Joseph L. Guza
 Kathryn G. D'Angelo
 Adam M. Lynch
 Emily H. O'Reilly⁷
 Richard A. Maltese, Jr.
 Joseph A. Agro
 Kenneth A. Grossberg

OF COUNSEL
 Patrick C. O'Reilly

SPECIAL COUNSEL
 Denis A. Scinta
 Richard D. Furlong
 Scott M. Schwartz
 Diane M. Perri Roberts

LICENSED WORKERS'
 COMPENSATION
 REPRESENTATIVE
 Keith T. Williams
 Patricia N. Lyman

¹ Also admitted in District of Columbia
² Also admitted in Florida
³ Also admitted in California
⁴ Also admitted in Illinois
⁵ Also admitted in Pennsylvania
⁶ Also admitted in Maryland
⁷ Also admitted in New Jersey

March 16, 2015

VIA ECF FILING

Hon. Frederic Block, U.S.D.J.
 United States District Court
 225 Cadman Plaza East
 Brooklyn, New York 11201

**RE: Jose Calderon v. Zano Industries, Inc. and Fred Provenzano
 Case No. 1:15-cv-00814 -FB-SMG**

Dear Judge Block:

Our office has been retained to represent the Defendants Zano Industries, Inc. and Fred Provenzano (“Defendants”) in the above-referenced matter. Defendants intend to file a Motion to Dismiss Plaintiff’s Complaint pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, and request that Plaintiff’s Complaint be dismissed in its entirety. In accordance with this Court’s Local Rules, I am writing to request a pre-motion conference with the Court and opposing counsel to discuss this motion. The last day for Defendants to respond to Plaintiff’s Complaint is March 19, 2015.

The basis for Defendants’ motion is that Plaintiff’s federal claim under the Fair Labor Standards Act, 29 U.S.C. § 201, et seq. (“FLSA”), is time barred and should be dismissed with prejudice. Concomitantly, as there is otherwise no federal jurisdiction over this dispute, Plaintiff’s state law claims should also be dismissed without prejudice.

By way of background, Plaintiff Jose Calderon (“Plaintiff”) is alleged to have been employed by Defendants from May 2008 to June 2009.¹ Plaintiff contends that during his alleged employment, Defendants failed to pay him all wages to which he was legally entitled.²

The alleged basis for federal jurisdiction over the subject matter of this dispute is predicated solely upon the Defendants’ alleged violation of the FLSA. To that end, Plaintiff alleges that jurisdiction is predicated upon 29 U.S.C. § 216(b), 28 U.S.C. § 1331 and 28 U.S.C. § 1337.³ Of the eight claims for relief alleged by Plaintiff, only the first claim for relief (Count 1) alleges an FLSA violation.⁴ The remaining seven (7)

¹ Complaint at ¶ 11 [Docket No. 1].

² *Id.* at ¶¶ 14-15.

³ *Id.* at ¶4. There can be no diversity jurisdiction because each of the parties are citizens of New York. *Complaint* at ¶¶ 8-10.

⁴ *Id.* at ¶¶ 17-28.





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claims allege either violation of New York statutes (Counts 2, 3 and 4) or New York common law (Counts 5-8).⁵ Plaintiff alleges supplemental jurisdiction for each of the state law claims.⁶

The statute of limitation for Plaintiff's FLSA claim is, at most, three (3) years;⁷ a fact Plaintiff admits in his Complaint.⁸ By his own admission, Plaintiff's alleged employment ended in June 2009. Under the FLSA, a claim accrues on the next regular payday following the work period when services are rendered. Plaintiff's FLSA claim therefore accrued, if at all, in June 2009, and was required to be brought by no later than June 2012. Plaintiff commenced this action on February 17, 2015. Accordingly, as clearly set forth on the face of his complaint, Plaintiff's FLSA claim was time-barred well prior to commencement of this action and should be dismissed.

Assuming that the federal claim is dismissed as time barred, the only remaining claims are Plaintiff's state law claims. This Court should elect not to hear those claims, which predominate Plaintiff's complaint, and dismiss them without prejudice for re-filing in state court, if at all.

Very truly yours,

LIPSITZ GREEN SCIME CAMBRIA LLP

By: Barry N. Covert
Barry N. Covert

BNC;jh

Cc: Gina Redrovan, Esq.

Writer's Extension: 365
Writer's Direct Fax: 716-8849-1315
E-Mail: bcovert@lglaw.com

⁵ *Id.* at ¶¶ 29-78.

⁶ *Id.* at ¶ 4.

⁷ 29 U.S.C. § 255(a).

⁸ *Complaint.* at ¶ 5.

